

**FILED**

JUL 24 2017

**WASHINGTON STATE COURT OF APPEALS  
DIVISION III**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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No. 336026

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M. STANLEY SLOAN,

Appellant,

v.

LEONARD HAMILTON and  
RUTH HAMILTON, husband and wife,  
And LRH, LLC,

Respondents.

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APPELLANT'S OPENING BRIEF

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**A. ISSUES RAISED**

(1) Did the trial court err in ruling that there were no disputed material facts and that as a matter of law Mr. Sloan's cause of action regarding unjust enrichment accrued before December 7, 2010, and was therefore time barred?

(2) Did the trial court err in ruling that there were no disputed material facts and that as a matter law Mr. Sloan's cause of action regarding equitable mortgage accrued before December 7, 2010, and was therefore time barred?

(3) Did the trial court err in ruling that there were no disputed material facts and that as a matter of law Mr. Sloan's cause of action regarding constructive trust accrued before December 7, 2010, and was therefore time barred?

(4) Did the trial court err in ruling that there were no disputed material facts and that as a matter of law Mr. Sloan's cause of action regarding breach of fiduciary duty accrued before December 7, 2010, and was therefore time barred?

(5) Did the trial court err in ruling that there were no disputed facts and that as a matter of law Mr. Sloan's cause of action regarding fiduciary accounting as to his vacation property sale proceeds (\$117,777.09) and

duplex rental income accrued before December 7, 2010, and was therefore time barred?

(6) Did the trial court err in ruling that there were no disputed material facts and that as a matter of law Mr. Sloan's cause of action regarding conversion accrued before December 7, 2010, and was therefore time barred?

**B. STATEMENT OF THE CASE**

**1. Procedural Background**

This litigation arises from a financial transaction involving Appellant' Stan Sloan's residential property, in which he had a substantial financial equity.

Having poor credit, Mr. Sloan conveyed the property to a friend, attorney Howard Herman, so Mr. Herman could obtain a loan to pay several of Mr. Sloan's financial obligations. Respondent Leonard Hamilton, acting as attorney-in-fact for Mr. Sloan, signed, and otherwise assisted with, the conveyance to Mr. Herman. In conjunction with the original conveyance, Mr. Hamilton, and his wife Ruth, subsequently obtained title to the property, with knowledge of Mr. Sloan's substantial equity.

Following a dispute with Mr. Sloan regarding expenses related to the property, Hamiltons evicted Mr. Sloan from the property, denying Mr. Sloan had any legal or equitable interest, including any financial equity in the property.

Appellant filed this lawsuit *pro se* on Monday, December 9, 2013, alleging causes of action for ejectment and quiet title, unjust enrichment, breach of fiduciary duty, and conversion.<sup>1</sup> CP 1-19. An Amended Complaint was filed October 17, 2014, dismissing the quiet title and ejectment claim, and adding causes of action for unjust enrichment, equitable mortgage, constructive trust, conversion, and an accounting.<sup>2</sup>

The respondents moved for summary judgment, contending that all causes of action were subject to a three-year statute of limitation, that the Appellant was on notice of his causes of action more than three years prior to filing the lawsuit, and that all claims must therefore be dismissed. CP 62; CP 77.

The trial court granted Respondents' motion (CP 192), reasoning that the Appellant was on notice of "red flag" events underlying his causes of action as early as the spring, summer and fall of 2010, and that

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<sup>1</sup>The Appellant was evicted December 7, 2010. Because December 7, 2013 fell on a Saturday, the action was filed on the next business day, December 9, 2013.

<sup>2</sup>Due to oversight, the Appellant's Amended Complaint was not included in the Designation of Clerk's Papers, and is therefore attached as an Appendix. Respondents' Answer to the amended complaint appears at CP 95-99.

Appellant had not disputed either the occurrence or the dates of those “red flag” events. E.g., RP 50-52.

Appellant’s motion for reconsideration was denied. CP 241. This appeal followed. CP 263.

## **2. Factual Background**

In 1972 Appellant Stan Sloan purchased real property commonly known as 6007 E. 12<sup>th</sup>, Spokane Valley, WA 99212, Tax Parcel No. 35243.0839 and legally described as:

THE EAST HALF OF LOT 15, ALL OF LOTS 16, 17, 18, 19, 20, 21, AND THE WEST 11 FEET OF LOT 22 IN BLOCK 3 OF BETTMAN’S ADDITION AS PER PLAT THEREOF RECORDED IN VOLUME “C” OF PLATS, PAGE 13, SITUATED IN THE COUNTY OF SPOKANE, STATE OF WASHINGTON.

CP 389. In the 1980’s Mr. Sloan constructed a two-story residential duplex on the site. CP 357, ¶ 3.

The upper unit of the Duplex property is 1,020 square feet, and the lower unit is 974 square feet. CP 448. Rent charged for the upper unit is higher than rent charged for the lower unit. CP 397, ¶ 7.

At all times from the date of its construction until December 2010, Mr. Sloan occupied some portion of the Duplex property as a residence and/or home office. CP 358, ¶ 9.

In 2004 Mr. Sloan was accused of shoplifting a \$1.29 doorstop from a hardware store. CP 421, ¶ 2. Based on the proprietor's accusation that Mr. Sloan attempted to hit him with his truck as he left the store parking lot, the shoplifting allegation was charged as first-degree robbery. CP 422, ¶ 4.

The prosecutor offered to settle the matter if Mr. Sloan would plead guilty to misdemeanor shoplifting and pay restitution. CP 422, ¶ 5. Believing himself innocent of shoplifting, Mr. Sloan declined the plea bargain. *Id.*

In October, 2004 a jury convicted Mr. Sloan of first-degree robbery, and he was sentenced to three years in prison. CP 422, ¶ 7.

From October 2004 to October 2006 Mr. Sloan was incarcerated by the Washington State Department of Corrections, having had a reduction of one year for good behavior. CP 396, ¶ 5; CP 421-422, ¶¶ 2-8.

Near the time Mr. Sloan began his incarceration, he asked long-time friend Leonard Hamilton to act as his attorney-in-fact to manage his financial and personal affairs during incarceration; Mr. Hamilton agreed to do so. CP 397, ¶ 9.

Mr. Sloan executed a durable power of attorney (POA) on February 21, 2005, appointing Mr. Hamilton as his attorney-in-fact. CP

404, ¶¶ 15-16; CP 423, ¶ 13. Granting of the POA was based solely upon Mr. Sloan's longtime friendship with and complete trust and confidence in Mr. Hamilton. CP 404, ¶¶ 15-16; CP 423, ¶¶ 12-13.

Around the time the POA was executed, attorney Howard Herman agreed to assist Mr. Hamilton with various tasks associated with managing Mr. Sloan's affairs during his incarceration. CP 397, ¶ 10.

One of the main tasks confronting Mr. Sloan, Mr. Hamilton and Mr. Herman was to raise money to pay small existing liens against the duplex property, as well as to pay attorney fees for Stan's criminal appeal and various legal actions associated with the estates of his deceased parents. CP 397, ¶ 6.

When Mr. Sloan, Mr. Hamilton and Mr. Herman began assessing Mr. Sloan's financial situation as of 2005, it was apparent to them that Mr. Sloan's own credit record was insufficient for him to obtain a loan against his duplex property. CP 398, ¶¶ 11-13.

Based upon the status of Mr. Sloan's credit record, it was agreed between Mr. Sloan, Mr. Hamilton and Mr. Herman that funds would be raised by deeding the duplex property to Howard Herman and his wife, who would then use it as security for a loan to cover Mr. Sloan's expenses.  
*Id.*

The express purpose of the plan was to obtain a loan for Mr. Sloan's benefit by using his own real property as security for the loan. CP 398, ¶ 11; CP 358, ¶¶ 4-6; CP 475, ¶ 6; CP 476, ¶ 9.

Thus, the duplex property was conveyed to Mr. and Mrs. Herman by warranty deed, which was executed by Mr. Hamilton acting as attorney-in-fact for Mr. Sloan. CP 398, ¶ 12; CP 30, ¶ 12; CP 477, ¶ 31. By having Mr. Herman use the duplex property as security for a loan, Mr. Sloan was able to use his own real property as security to raise money, thereby avoiding having to borrow money from friends and/or relatives, and without having to sell the property at a "fire-sale" price.

A loan of approximately \$67,000 was obtained by Mr. and Mrs. Herman. CP 398, ¶ 12; CP 477, ¶ 31.

The proceeds from this loan were used to reimburse Mr. and Mrs. Herman for payments they had recently made to clear existing liens against the duplex property, as well as to reimburse Hamiltons for various expenses they had recently incurred on Mr. Sloan's behalf. *Id.*

The balance of the loan proceeds was placed in an account at Bank of America, Hillyard Branch (hereafter Trust Account), which Hamiltons then used to pay legal fees and other expenses on Mr. Sloan's behalf. CP 398, ¶¶ 13-14; CP 475, ¶ 6.

The Trust Account at the Bank of America was at all times under the sole and exclusive control of the Hamiltons. CP 423-424, ¶ 15.

Proceeds from a check issued to Mr. Sloan by Mountain View Credit Union, in the amount of \$117,777.09 were given to Hamiltons to use as needed for Mr. Sloan's expenses. These funds were also deposited in the Trust Account. CP 261; CP 422-423, ¶¶ 9-10; RP 25.

Mr. Sloan has been entitled to but Mr. Hamilton has not provided a documented accounting of the proceeds derived from the sale of Mr. Sloan's Idaho property. CP 476, ¶ 11.

From the time he was appointed attorney-in-fact by Mr. Sloan, until the property was sold in 2015, Mr. and Mrs. Hamilton managed the duplex property. CP 476, ¶ 11.

Until Hermans deeded the duplex property to Hamiltons, rental proceeds were used, in large part, to pay the loan Mr. and Mrs. Herman had obtained for Mr. Sloan's benefit. CP 90-91, ¶ 15

During Mr. Sloan's incarceration and after his release, title to the duplex property remained in the names of Mr. and Mrs. Herman. CP 398, ¶ 15. Several months after his release from prison, Mr. Sloan resumed residency in the duplex. CP 427.

Mr. and Mrs. Herman always considered themselves to be holding the duplex property in trust for Mr. Sloan, in that it constituted security

for the loan they had obtained to help with his financial obligations. CP 399, ¶¶ 16-19.

In 2008 Mr. and Mrs. Herman decided they no longer wanted the duplex property in their names, because if it remained that way and they were to pass away, they were concerned that Mr. Sloan's substantial interest would mistakenly end up as part of their estates. CP 400, ¶ 17; CP 478, ¶ 21.

Because Mr. Sloan's credit record in 2008 was still insufficient to refinance the duplex property or otherwise obtain a loan himself, it was decided by Mr. Sloan, the Hermans and the Hamiltons that the duplex property would be conveyed to Hamiltons. CP 400, ¶ 17. It was further agreed between the parties that Hamiltons would obtain new replacement financing, pay off the note and trust deed that Mr. and Mrs. Herman had previously undertaken, and secure the replacement financing with the duplex property. CP 400, ¶¶ 18-19.

In July 2008 Hamiltons arranged financing in the approximate amount of \$53,900.00. CP 413; CP 401-402, ¶¶ 19-20; CP 393. Title to the property was conveyed from Hermans to Hamiltons July 11, 2008. CP 393.

The duplex property was appraised in 2012 at a fair market value of \$165,000.00. CP 442.

At some point in late 2007, while title was still in the name of Hermans, Hamiltons requested that Mr. Sloan sign a lease (the Lease) regarding the duplex property. CP 428-429, ¶¶ 24-26. Mr. Sloan was occupying the lower unit.

On or about January 1, 2008, the Lease was signed, designating “LRH, LLC” as the lessor and Mervin Stanley Sloan as the lessee. CP 324.

At the time the lease was signed, title to the duplex property was still in the name of Hermans, and there is no evidence in the record that Hamiltons were authorized or requested by Hermans to enter into a lease with Sloan on their behalf or otherwise.

The Lease set Mr. Sloan’s “rent” at \$400.00 per month. CP 324. The Lease provided that in the event of litigation regarding its interpretation and/or enforcement, the prevailing party would be entitled to reasonable costs and attorney fees. CP 324, ¶ 16.

In 2009 it was determined the hookup to the municipal sewer system for the duplex property must be repaired. CP 428, ¶ 23. Mr. Sloan went to the Spokane County Planning Department (Planning) to apply for the appropriate permit authorizing sewer system repairs. *Id.*

Upon inquiring with the Spokane County Planning Department regarding a permit for repairs, Mr. Sloan was advised that because

Hamiltons were listed as the owners of the property, they could not issue a permit to him. *Id.*

Mr. Hamilton signed a letter stating that Mr. Sloan had a substantial financial ownership interest in the property. CP 416. Based on the letter signed by Mr. Hamilton, Planning issued Mr. Sloan a permit that identified him as having a substantial ownership interest in the property. *Id.*; CP 414-415.

In late 2009, Mr. Hamilton sent Mr. Sloan invoices requesting rent payments. CP 329-330. Financial disputes were erupting, and in March 2010 Mr. Hamilton sent Mr. Sloan a letter demanding rent, stating that the duplex property was going to be sold. CP 407. Shortly thereafter, Mr. Sloan revoked the durable power of attorney he had granted Mr. Hamilton in 2005. CP 387-388.

In August 2010, Hamiltons initiated unlawful detainer proceedings against Mr. Sloan, based on the “Lease” Mr. Sloan had signed. CP 377; CP 477, ¶27; CP 335-336. The unlawful detainer hearing was set for September 8, 2010. CP 367.

On September 7, 2010 Mr. Sloan filed an answer and supporting declaration, asserting his substantial ownership interest in the property, and requesting an evidentiary hearing. CP 357-359; CP 360-362. Mr. Sloan also filed a notice of bankruptcy. CP 353.

Mr. Sloan appeared in court on September 8, 2010, but the hearing had been cancelled. CP 402, ¶ 8.

Thereafter, Hamiltons again filed for unlawful detainer proceedings, setting the hearing for November 30, 2010. CP 349. However, neither the Hamiltons nor their attorney, Mr. McGarry, provided Mr. Sloan notice of the November 30, 2010 proceedings, which were set for 9:00 a.m. before Judge Moreno.

Mr. Sloan, not having received notice, did not appear. Accordingly, Judge Moreno issued a writ of restitution. CP 402-403; CP 93-94. As a result of not being notified of the hearing, Mr. Sloan was deprived of the evidentiary inquiry and examination by the trial court, to which he was entitled pursuant to RCW 59.18.380. In short, Hamiltons obtained the writ of restitution — and possession of the real property and Mr. Sloan's chattel property — unlawfully.

Pursuant to the writ of restitution, the Spokane County Sheriff evicted Mr. Sloan from the duplex on December 7, 2010. CP 311; CP 335.

Following Hamiltons' eviction of Mr. Sloan, and presumably up until the property was sold in January 2015, both units were rented to tenants. CP 398, ¶ 15.<sup>3</sup>

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<sup>3</sup> Judging by the \$400.00 rent charged Mr. Sloan, rental income from both units probably generated \$1000.00 to \$1200.00 per month for the Hamiltons, which was undoubtedly far more than their monthly payment on the loan secured by the property.

Mr. Hamilton gave Mr. Sloan and “oral” option to purchase the property for the amount he (Mr. Hamilton) had into it. CP 117; CP 33, ¶ 28. Presumably, the amount Hamiltons had “into it” was the amount of the loan secured by the property, minus monthly rental proceeds the property generated.

On October 14, 2011, the court vacated the Writ of Restitution, inasmuch as Mr. Sloan had not been given notice of the eviction proceedings of November 30, 2010. CP 438-439.

In 2014, while the present litigation was pending, the parties entered into a stipulation whereby Hamiltons would sell the duplex and deposit the proceeds with the clerk of the court.<sup>4</sup> CP 87. In 2015 the duplex actually sold for \$141,075.00 (CP 237), netting a profit of \$79,529.36. CP 236-237; CP 268; CP 235.

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<sup>4</sup> In their summary judgment memorandum, Hamiltons characterized the conveyances from Sloan to Hermans and Hermans to Hamiltons as a “sale” thirteen times and a “purchase” eight times, apparently to create in the court’s view the inference that they (Hamiltons) were bona fide purchasers for value, without notice of Sloan’s equitable interest. E.g., CP 83, lines 6 and 23; CP 66-70; CP 423, ¶ ¶ 13-15; CP 62-76. This mischaracterization is at the core of a scheme to deprive Mr. Sloan of his equitable interest in the duplex property. See *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212 (1960): (bona fide purchaser for value is one who without notice of another's claim of right to, or equity in, the property prior to his acquisition of title, has paid the vendor a valuable consideration); see also, *In re Marriage of Lutz*, 74 Wn. App. 356, 369-370, 873 P.2d 566(1994): (scheme to deprive one of interest in real property “demonstrates clear element of unconscionability” justifying imposition of constructive trust to avoid unjust enrichment).

Again, Mr. Sloan contends the conveyances were part of a plan entered into for the purpose of using *his own property* as security to obtain loan proceeds for his personal expenses. Appendix pp. 6, 22 (Amended Complaint, ¶¶ 22, 105, 106); CP 358, ¶¶ 4-5. Mr. Sloan’s contention is fully corroborated by Howard Herman. CP 399, ¶ 16.

Mr. Sloan further contends, as a factual matter, that until he was actually evicted from the duplex by the County Sheriff, he believed that the dispute between himself and the Hamiltons was based on the payment of expenses, and *not* an actual intent on the part of Hamiltons’ to deprive him of his entire equity in the property, nor possession of his chattel property. CP 427, lines 20-23; CP 429, lines 4-7; CP 429 ¶¶ 25-26; CP 430, ¶ 29. Again, his relationship with Leonard Hamilton was based on years of close interaction and friendship. CP 423, ¶ ¶ 12-13.

#### **D. ARGUMENT**

##### **(1) Summary of Argument**

At its core, this litigation involves a financial arrangement between three friends: Stan Sloan, Howard Herman, and Leonard Hamilton. In his declaration, Mr. Herman referred to the arrangement as the “agreed plan” entered into between himself, Mr. Sloan, and Mr.

Hamilton. CP 398, ¶ 12. The purpose of the “agreed plan” was to assist Mr. Sloan solve his financial problems.

The focal point of the arrangement was the residential duplex Mr. Sloan built in the 1980’s. For analytical purposes, the arrangement and its aftermath can be viewed in four parts.

Part I of the arrangement consisted of the conveyance by Mr. Hamilton, acting as Mr. Sloan’s attorney-in-fact, of Mr. Sloan’s duplex to Howard Herman. In turn, Mr. Herman used the duplex to secure a loan to pay Mr. Sloan’s existing and future financial obligations: Mr. Sloan’s credit was insufficient to obtain a loan.

That part of the arrangement was carried out, and loan proceeds of approximately \$67,000.00 were obtained by Mr. Herman and transferred to Mr. Hamilton (Mr. Sloan’s attorney-in-fact) to use for Mr. Sloan’s benefit. At that time, an equitable mortgage arose. *Thomas v. Osborn*, 13 Wn. App. 371, 375, 536 P.2d 8 (1975): (equitable mortgage arises when money is loaned and the parties intend to create a lien on the debtor’s property as security for the debt’s payment.)

Part II of the arrangement consisted of Mr. and Mrs. Herman conveying the duplex to Mr. and Mrs. Hamilton in 2008, because Mr. and Mrs. Herman wished to remove themselves from the title and all obligations related to the loan. In turn, Mr. Hamilton then obtained a loan

for approximately \$53,000.00, secured by the duplex property, and thereby replaced Mr. Herman's loan. The equitable mortgage created when the duplex was conveyed to Mr. Herman continued in existence after the conveyance to Mr. Hamilton, in that Mr. and Mrs. Hamilton were well aware of Mr. Sloan's interest in the property, and the circumstances under which the property had been conveyed to Mr. and Mrs. Herman.

Part III of the dispute centered on conflict between Mr. Sloan and the Hamiltons regarding expenses related to the duplex, and Mr. Sloan's failure to sufficiently contribute to those expenses, i.e., mortgage payments. Having their names on the title to the duplex, and being obligated for monthly payments on the loan secured by the duplex, Hamiltons decided Mr. Sloan must either pay toward duplex expenses or move out. CP 328-330; CP 407.

Hamiltons brought an action in superior court to evict Mr. Sloan from the duplex. CP 336; CP 341. In his declaration supporting Mr. Sloan's eviction, Mr. Hamilton described his relationship with Mr. Sloan as "never being anything more than a landlord and tenant." CP 321. Additionally, Mr. Hamilton claimed to have little knowledge of just how Howard Herman happened to obtain title to the duplex property:

My wife Ruth Hamilton and I purchased the property on or about July 11, 2008 from Attorney Howard Herman. I understand that the Defendant Mervin

Stanley Sloan owned the subject real estate and granted attorneys a deed of trust to secure payment for attorney fees. Mr. Sloan apparently defaulted on his obligations to attorney Howard Herman. The attorney apparently foreclosed on the deed of trust or otherwise obtained title to the property.

CP 320. Mr. Sloan was evicted from the duplex on December 7, 2010.

CP 311.

Part IV of this dispute occurred in early 2015, when Hamiltons sold the duplex. Having denied Mr. Sloan's equitable mortgage interest in the property, and having vowed not to give Mr. Sloan anything (CP 479, ¶ 33), Hamiltons claimed for themselves the net profit of \$79,529.35. Having granted summary judgment on all causes of action, the trial court ordered the clerk of the court to pay Hamiltons the net profit, which was done on April 30, 2015. CP 192-193.

Thus, when in early 2015 Hamiltons sold the duplex property and thereby paid off their mortgage which it secured, then retained the net profit of \$79,529.35 solely for themselves, they *instantly* became *unjustly* enriched. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473 (2007).

In summary, Mr. Sloan contends the trial court erred in dismissing his causes of action based on the statute of limitations, for the following reasons.

Unjust Enrichment: As a matter of law, Hamiltons were not unjustly enriched until January, 2015, when they sold the duplex property, generating a \$79,529.35 profit, and failed to account for either that profit or duplex rental income and expenses. Mr. Sloan's cause of action for unjust enrichment did not accrue until 2015.

Equitable Mortgage: Mr. Sloan's equitable mortgage on the duplex property arose when he conveyed title to Mr. and Mrs. Herman. Mr. Sloan's cause of action to enforce the equitable mortgage did not accrue until 2015, when Hamiltons sold the property and were thereby able to pay off their mortgage secured by the duplex. The sale generated a profit of \$79,529.35, which they unjustly retained for themselves.

Constructive Trust: A constructive trust in favor of Mr. Sloan did not arise until January 2015, when Hamiltons sold the duplex property, denied the existence of an equitable mortgage, and retained the profit of \$79,529.35 for themselves. The purpose of a constructive trust is to thwart unjust enrichment. Hamiltons were not unjustly enriched until 2015, and therefore no cause of action to enforce a constructive trust accrued until 2015.

Breach of Fiduciary Duty: Whether Mr. Sloan knew or should have known of a breach of fiduciary duty by Mr. Hamilton raises a question of fact which is disputed by the parties. Hamiltons claim that

specific “red flag” events put Mr. Sloan on notice of facts constituting a breach of fiduciary duty. Mr. Sloan contends he believed Hamiltons were angry regarding expenses related to the duplex property, not that they intended to or ever would actually take his equity in the property, misuse the \$117,777.09 vacation property proceeds they held for him, or seize and dispose of all his chattel property.

Conversion of Chattel: Hamiltons did not obtain possession of Mr. Sloan’s chattel property until *after* he was evicted on December 7, 2010. Therefore, as a matter of law, his action for conversion, filed December 9, 2013 was timely filed within three years.

**(2) Standard of Review**

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). In addition, "[q]uestions of fact may be determined as a matter of law `when reasonable minds could reach but one conclusion.'" *Id.* at 788 (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most

favorable to the nonmoving party — in this case, Mr. Sloan. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

The sole issue on appeal is whether Mr. Sloan’s causes of action are barred by the three-year statute of limitations applicable to each. Hamiltons contend Mr. Sloan knew or should have known the elements of each cause of action more than three years before December 7, 2013.

**(3) Limitations of Actions: Generally**

The question of when a plaintiff should have discovered the elements of a cause of action that begins the running of the statute of limitation is ordinarily a question of fact. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 34-35, 864 P.2d 921 (1993): (where hospital failed to disclose nature of its conduct regarding patient’s cardiac arrest, due diligence exercised by parent in discovering cause of action); *Honcoop v. State*, 111 Wn.2d 182, 194, 759 P.2d 1188 (1988): (whether dairy farmer knew or should have known the facts underlying cause of action is a question of fact for the jury); *Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 510, 598 P.2d 1358 (1979): (formulation of discovery rule is question of law, application of discovery rule is question of fact).

The issue of whether a plaintiff has suffered actual damages triggering the statute of limitations can be decided as a matter of law only if reasonable minds could reach but one conclusion. *Hudson v. Condon*, 101 Wn. App. 866, 875, 6 P.3d 615 (2000). Because the statute of limitations is an affirmative defense, the burden of proof is on the defendant. *Mayer, supra*, 102 Wn. App. at 76.

Unless evidence is undisputed or unless reasonable minds cannot differ, what a person knew or should have known at a given time is a question of fact. *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 170, 855 P.2d 680 (1993).

Mr. Sloan contends that Hamiltons demand for rent and eviction proceedings did not put him on notice that Mr. Hamilton had breached fiduciary duties, most notably because of his longtime friendship with Leonard Hamilton. CP 404, ¶¶ 15-17.

**(4) Hamiltons' View of Statute of Limitations**

Hamiltons argued that several events provided notice to Mr. Sloan of his causes of action against the Hamiltons, and that those events occurred more than three years prior to December 7, 2013. They concluded, therefore, that each cause of action is barred by the three-year statute of limitation. In part, the trial court referred to these occurrences

as “red flags,” and agreed that Mr. Sloan was on notice of his causes of action more than three years before December 7, 2013. RP 38-52.

First, Hamiltons contended that their demand, in January 2008 that Mr. Sloan sign a lease — more than three years before January 7, 2013 — necessarily put him on notice that Hamiltons were claiming full ownership of the property *and* were totally repudiating his equitable interest. RP 9. Mr. Sloan contends that he believed the purpose of the lease was to manage the property and create, for refinancing purposes, the impression that the premises were fully rented. CP 427; CP 428, ¶ 24; CP 361, ¶ 1.9.

Second, Hamiltons claimed that the “sale” from Hermans to them on July 6, 2008, put Mr. Sloan on notice of his causes of action for unjust enrichment and rental income accounting: “The plaintiff would have known of any potential claim when he did not receive any compensation at the time of the July 6, 2008 sale of the property from Mr. Herman to the Hamilton(s).” CP 120.

Mr. Sloan, however, has never claimed that the conveyance from Hermans to Hamiltons was a “sale” to a bona fide purchaser, or that that conveyance triggered a duty on Hamiltons part to pay him the value of his equity, or account for rental monies. Indeed, the conveyance from Hermans to Hamiltons did not generate any profit or change the “the

agreed plan” in any way whatsoever. Rather, conveyance of the duplex to Hamiltons was done for the sole purpose of accommodating Hermans’ desire to get title out of their names, and step away from responsibilities connected with the property. CP 399, ¶¶ 17-18.

Third, Hamiltons argued that the letter to Mr. Sloan demanding rent and advising him of their intent to sell the property (CP 407), more than three years before December 7, 2013, put him on notice that they were repudiating any interest he might have in the property, equitable or otherwise. RP 10.

However, the fact that Hamiltons told Mr. Sloan in the spring of 2010 that they intended to sell the property could not serve to put Mr. Sloan on notice of a breach of any particular fiduciary duty or that, once the property was sold, they would retain all equity/profit for themselves. He could not have known that fact until the property was actually sold, which did not occur until January 2015.

Most importantly, however, Hamiltons’ duty to account for Mr. Sloan’s equity interest, or any profit from rental income, could not arise until either (1) Mr. Sloan paid Hamiltons what they “had in it” (CP 64) or (2) the property was sold and Hamiltons’ loan, secured by the property, was paid off. See *Smith v. Monson*, 157 Wn. App. 443, at 448, 236 P.3d 991 (2010): (equitable mortgage created duty to convey real property back

to the borrower once she paid off the underlying home loan). Otherwise stated, the property was burdened with an equitable mortgage, but the constructive trust did not arise until Hamiltons unjustly enriched themselves by retaining the \$79,529.35 profit generated by sale of the property — as discussed in more detail below.

Fourth, Hamiltons argued that their initiation of eviction proceedings in August 2010 and again in November 2010, more than three years before December 7, 2013, put Mr. Sloan on notice of their claim of total ownership and repudiation of his equitable interest. RP 11. Again, Mr. Sloan believed Hamiltons were simply angry regarding his failure to pay expenses related to the property.

Fifth, Hamiltons contended that no equitable mortgage was created by the conveyance from Mr. Sloan to Hermans (RP 19), that there was never any *intention* to create an equitable mortgage, and that Hamiltons paid Hermans, not Mr. Sloan, evidencing a “normal every day housing transaction.” RP 19, RP 21; CP 71. Mr. Sloan denies that the conveyance from Hermans to Hamiltons was anything other than a continuation of the original “agreed plan.”

Sixth, Hamiltons denied that a constructive trust ever existed. They argued that if, for the sake of discussion, a constructive trust ever did exist, the eviction proceedings and related matters put Mr. Sloan on

notice — more than three years before December 7, 2013 — of his cause of action to enforce any constructive trust. RP 22-24. Again, a constructive trust did not arise *until* Hamiltons unjustly enriched themselves in January 2015.

Seventh, Hamiltons asserted that Mr. Sloan was entitled to an accounting for *neither* the duplex rents nor the \$117,777.09 vacation property sale proceeds, the latter having been received by Mr. Hamilton in 2006. Hamiltons' argument on this point was that after Mr. Sloan was released from prison, there was no need for Mr. Hamilton to do anything, and he did not do anything, pursuant to the POA. CP 476, ¶ 16.

As to duplex property rents, Hamiltons reasoned that because Mr. Sloan did not own the property, he was not entitled to an accounting — in essence, concluding that Mr. Sloan lacked standing to seek an accounting. RP 25. Alternatively, Hamiltons claimed Mr. Sloan knew he was entitled to an accounting regarding rents when he terminated Mr. Hamilton's POA and, consequently, the statute of limitations accrued at that time — in April, 2010. RP 26-27.

With respect to the \$117,777.09 vacation property sale proceeds, Hamiltons contended (1) the proceeds were disbursed by the bank to Mr. Sloan in 2003 (CP 261), (2) Mr. Hamilton was not appointed attorney-in-fact until 2005 (CP 384), (3) Mr. Hamilton's POA was terminated in April

2010, (4) after which he performed no acts pursuant to the POA, and (5) therefore, Mr. Sloan's cause of action regarding the vacation property proceeds accrued at the time the POA was terminated, more than three years before December 7, 2013. RP 27. The gist of this argument is that Mr. Hamilton's duty to account for Mr. Sloan's money (that came into his hands while acting as attorney-in-fact) ended when the POA was revoked. On the contrary, Hamiltons' duty to account arose, via constructive trust principles, when they sold the duplex property and retained for themselves the large profit.

Finally, Hamiltons' motion for summary judgment did not address Mr. Sloan's claim regarding conversion of his chattel property. See Complaint, CP 17; Amended Complaint, Appendix pp. 29-30; Answer to Amended Complaint, CP 96, ¶ 3; Defendants' Summary Judgment Memorandum, CP 115-126.

**(5) Limitation of Action: Unjust Enrichment**

The statute of limitations for unjust enrichment is three years. RCW 4.16.080(3); *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 837-38, 991 P.2d 1126 (2000).

A cause of action to enforce an equitable mortgage does not arise until a person has been unjustly enriched — that is, "when he has profited

or enriched himself at the expense of another contrary to equity.” *Cox v. O'Brien*, 150 Wn. App. 24, 37, 206 P.3d 682 (2009). "Enrichment alone will not trigger the doctrine; the enrichment must be unjust under the circumstances and as between the two parties to the transaction." *Dragt v. Dragt/De Tray, LLC*, 139 Wn. App. 560, 161 P.3d 473 (2007).

Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. *L & A Drywall, Inc. v. Whitmore Const. Co., Inc.*, Utah, 608 P.2d 626, 630.

A more descriptive summary of unjust enrichment appears in *Bill v. Gattavara*, 34 Wn.2d 645, at 648, 209 P.2d 457 (1949):

A person should not be permitted unjustly to enrich himself at the expense of another. The obligation to do justice rests upon all persons and if one obtains the property of another, or the proceeds of the property of another, without a right to so obtain, equity can, in a proper case, compel restitution or compensation. It is not necessary in order to create an obligation to make restitution or to compensate, that the party unjustly enriched should have been guilty of any tortious or fraudulent act. The question is: Did he, to the detriment of someone else, obtain something of value to which he was not entitled?

Three elements must be established for unjust enrichment: (1) there must be a benefit conferred on one party by another; (2) the party receiving the benefit must have an appreciation or knowledge of the benefit; and (3) the receiving party must accept or retain the benefit under

circumstances that make it inequitable for the receiving party to retain the benefit without paying its value. *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 159-60, 810 P.2d 12 (1991). The three elements are met in the present case.

First, a benefit was conferred on Mr. Hamilton, consisting of title to and control over the duplex property, including rental income generated by the property for approximately ten years. Second, Mr. Hamilton had knowledge of the benefit, and that it consisted of Mr. Sloan's duplex property. Third, retaining the benefit of a \$79,529.35 profit from sale of the property, plus all rental income generated over a period of approximately ten years, occurred under circumstances that make it inequitable for Hamiltons to retain the benefit without paying its value.

An action for unjust enrichment lies in a promise *implied by law* that one will render to the person entitled thereto that which in equity and good conscience belongs to that person. *Hedin v. Roberts*, 16 Wn. App. 740, 742, 559 P.2d 1001 (1977). The *Hedin* court stated that "The promise to pay, implied by law, is the promise that was broken." *Id.*

What promise must be implied in law and imposed on Hamiltons regarding unjust enrichment, as it relates to their control over and disposition of Mr. Sloan's real property, and when was each implied promise broken?

The promise implied in law that must be imposed on Hamiltons is the promise that: Once the debt and other expense we incurred on behalf of Mr. Sloan relating to the duplex property is paid in full, we will return to Mr. Sloan the value of his real property, including the net profit derived from sale, as well as the net profit, if any, generated by monthly rent over the years.

The foregoing promise, implied in law on equity principles, was broken when in January 2015 the debt and expense incurred by Hamiltons was repaid through sale of the duplex property. The implied promise having been broken by Hamiltons in 2015, Mr. Sloan's cause of action to remedy the broken promise was timely (prematurely) filed, seeking to remedy unjust enrichment by imposing a constructive trust to enforce an equitable mortgage.

The inequity of this situation is illustrated by the following facts. Hamiltons did not pay fair market value for the property but, rather, merely obtained a mortgage against it of approximately \$53,000.00 — sufficient to replace the loan Hermans had obtained for Mr. Sloan's benefit. CP 413. The appraised value of the duplex in 2012 was \$165,000.00. CP 442. That appraised value was substantially more than *twice* what Hamiltons had “into it.” CP 33, ¶ 31; CP 34, ¶ 22. And, the fact that the property was worth far more than what Hamiltons had “into

it” was borne out when it was sold in 2015, producing a net profit of \$79,529.35.

(6) **Limitation of Action: Equitable Mortgage**

An equitable mortgage *arises* at the time of the transaction when money is loaned or credit given and the parties intend to create a lien upon the property of the debtor as security for payment of the debt. *Thomas v. Osborn*, 13 Wn. App. 371, 375, 536 P.2d 8 (1975).

"[T]he character of the transaction is fixed at its inception and ... it is what the intention of the parties makes it." *Johnson v. National Bank of Commerce*, 65 Wash. 261, 268-69, 118 P. 21 (1911).

A debtor having an equitable mortgage on property is not entitled to reconveyance of the property *until* the debt secured by the mortgage is paid. *Smith v. Monson*, 157 Wn. App. 443, 448, 236 P.3d 991 (2010): (title owner of property subject to equitable mortgage is under duty to convey it back to the debtor “once they paid off the ... loan”).

With respect to the “intent” of the parties, Hamiltons have hotly contested Mr. Sloan’s contentions that “the agreed plan” (1) was to use the duplex as security for a loan, and (2) that the conveyances were not ever intended to be an outright sale of the duplex property. See footnote 4, *supra*. In any event, a person’s intent raises a question of fact. *Bauman*

*v. Turpen*, 139 Wn. App. 78, 89, 160 P.3d 1050 (2007). Inferences drawn from the evidence before the trial court must, however, be construed in favor of Mr. Sloan. Evidence was presented by Mr. Sloan that it was the intent of the parties that the conveyance to Hermans constituted security for a loan to benefit Mr. Sloan. Accordingly, he must be deemed to have had an equitable interest in the duplex property when it was conveyed to Hamiltons..

An equitable mortgage arose in the present case when the duplex was conveyed by Mr. Hamilton, acting as Mr. Sloan's attorney-in-fact, to Mr. and Mrs. Herman. Mr. Herman, an attorney, believed that he was holding the property "in trust" for Mr. Sloan "as security for the loan we obtained to help with his financial obligations." CP 399, ¶ 16. *See Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 966, 948 P.2d 1264 (1997): (if deed is conveyed with the intent to create a debtor-creditor relationship, it may create an equitable mortgage); *Thomas v. Osborn*, 13 Wn. App. 371, 375, 536 P.2d 8, (1975): (equitable mortgage arises when money is loaned and the parties intend to create a lien on the debtor's property as security for the debt's payment).

Thus, Hamiltons became unjustly enriched when the duplex property was sold in January 2015, at which time their loan, secured by the duplex, was paid in full, and they retained the net profit of \$79,529.35.

At that time, and not before, Mr. Sloan was entitled to either reconveyance of the duplex property, or conveyance to him of the substantial net profit derived from sale of the property.

Again, facts regarding the nature of the transaction are disputed, but must be interpreted in favor of Mr. Sloan's claim that an equitable mortgage was intended. As a matter of law, Mr. Sloan's cause of action to enforce his equitable mortgage accrued when the property was sold, in January, 2015. Therefore, his lawsuit was not initiated *late*, it was *premature*.

Mr. Sloan's cause of action to enforce his equitable mortgage should not have been dismissed on summary judgment.

**(7) Limitation of Action: Constructive Trust**

Constructive trusts arising in equity are imposed when there is clear, cogent, and convincing evidence of the basis for impressing the trust. *Manning v. Mount St. Michael's Seminary*, 78 Wn.2d 542, 546, 477 P.2d 635 (1970).

Constructive trusts "arise independently of the intention of the parties, and may arise even though acquisition of the property is not wrongful." *Consulting Overseas Management, Ltd. v. Shtikel*, 105 Wn. App. 80, 87, 18 P.3d 1144 (2001), quoting *Mehelich v. Mehelich*, 7

Wash.App. 545, 551, 500 P.2d 779 (1972). Clearly, Hamiltons' acquisition of title occurred with the consent of Mr. Sloan, and was not wrongful.

A cause of action to enforce a constructive trust does not arise until a person has been unjustly enriched — that is, "when he has profited or enriched himself at the expense or another contrary to equity." *Cox v. O'Brien*, 150 Wn. App. 24, 37, 206 P.3d 682 (2009).

The statute of limitations regarding a constructive trust begins to run when the beneficiary discovers or should have discovered the wrongful act which gave rise to the constructive trust. RCW 4.16.080(3); *Arneman v. Arneman*, 43 Wn.2d 787, 800, 264 P.2d 256 (1953); *Viewcrest Coop. Ass'n v. Deer*, 70 Wn.2d 290, 294-95, 422 P.2d 832 (1967).

*Arneman v. Arneman* defines the proper outcome regarding Mr. Sloan's constructive trust claim.

In *Arneman*, one brother (Herbert) sued another brother (Arthur) in 1951, alleging that Arthur was wrongfully retaining real property in his own name, that the property actually belonged to the brothers' corporation, and that a constructive trust in favor of the corporation should be imposed on the property. Arthur had, in part, expended his own resources and those of the corporation to acquire the property from the county in 1943. Because the county was unwilling to sell the property to

the corporation, it was conveyed to Arthur, in his name — not the corporations' name.

In 1947, Herbert had asked Arthur when he was going to transfer the property to the corporation, to which Arthur replied “One of these days I’ll fix it.” Herbert said nothing more about it until filing suit four years later, in 1951. At some time before trial, Arthur was fully compensated for his contribution to purchase of the property from the county.

Arthur asserted the three-year statute of limitations as a defense regarding Herbert’s constructive trust claim. Following Herbert’s presentation of his case in a bench trial, Arthur’s motion challenging sufficiency of the evidence was granted.

On appeal, our Supreme Court ruled that Herbert’s constructive trust claim was not barred.

Noting that the three-year statute of limitation (RCW 4.16.080(4)) applied, and that Arthur had been fully reimbursed for his contribution to purchase of property from the county, the Court cited Judge Cardozo’s definition of a constructive trust:

A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

Judge Benjamin Cardozo, *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, at 386, 122 N.E. 378, 380.

The Court determined that the statute of limitations “would not begin to run until Herbert discovered, or should have discovered, that Arthur had received full compensation and was therefore fraudulently withholding the property.” Further, the Court held that the constructive trust did not even come into existence “until Arthur received full compensation for the purchase price and other expenses.”

The Court concluded that Arthur became the trustee of a constructive trust in favor of the brothers’ corporation upon failing to convey the property to the corporation after being fully reimbursed.

Again, the *Arneman* case defines the proper outcome regarding Mr. Sloan’s constructive trust claim.

Hamiltons, through Mr. Hamilton’s declarations, dispute that the conveyances from Sloan to Hermans and Hermans to Hamiltons were intended to secure loans, asserting adamantly that the conveyances were actually arms-length sales, free of any legal or equitable interest in Mr. Sloan. See footnote 4, *supra*; CP 399, ¶ 16. As discussed above, Mr. Sloan and Mr. Herman controvert Mr. Hamilton’s contention. In any event, inferences drawn from evidence before the trial court must, however, be

construed in favor of Mr. Sloan. Accordingly, he must be deemed to have had an equitable interest in the duplex property.

As in *Arneman*, the constructive trust regarding Mr. Sloan's equitable interest in the property did not "come into being" until Hamiltons received full compensation, through sale of the duplex property, whereby their loan, secured by the duplex property, was paid with sale proceeds in 2015.

As with Arthur becoming trustee of the real property on behalf of the Arneman brothers' corporation, Hamiltons became trustee of the net sale proceeds of \$79,526.35 on behalf of Mr. Sloan when they sold the property and were reimbursed for their loan.

As with the statute of limitations defense raised by Arthur against his brother's constructive trust claim, Hamiltons' statute of limitation defense must also fail. That is, the statute of limitations did not begin to run until Hamiltons were reimbursed through sale of the duplex in January, 2015 — and their wrongful conduct occurred by virtue of refusing to convey the net proceeds to Mr. Sloan.

At that time, Mr. Sloan's constructive trust claim had already been filed. Otherwise stated, Mr. Sloan's constructive trust claim was not late, it was *premature*. Thus, Hamiltons were not "unjustly" enriched until the duplex was sold, allowing their mortgage to be paid in full, whereupon

they grasped for themselves all profit derived from the sale — profit to which Mr. Sloan was entitled.

**(8) Limitation of Action: Breach of Fiduciary Duty**

An attorney-in-fact is an agent to whom the principal has given authority to act in his or her stead for the purposes set forth in the power of attorney. *See Bryant v. Bryant*, 125 Wn.2d 113, 118-19, 882 P.2d 169 (1994). In that role, the agent becomes a fiduciary who is bound to act with the utmost good faith and loyalty and to fully disclose all facts relating to his interest in and his actions involving the affected property; the agent must also deliver all benefits derived from or inuring to the property from the agent's breach of the fiduciary relationship to the principal. *Crisman v. Crisman*, 85 Wn. App. 15, 22, 931 P.2d 163 (1997) (citing *Moon v. Phipps*, 67 Wn.2d 948, 956, 411 P.2d 157 (1966)).

A cause of action for breach of fiduciary duty has two elements: (1) breach of duty, (2) proximately causing damage. *Senn v. Northwest Underwriters, Inc.*, 74 Wn. App. 408, 414, 875 P.2d 637 (1994).

The applicable statute of limitations regarding breach of fiduciary duty is three years. RCW 4.16.080; *Browning v. Howerton*, 92 Wn. App. 644, 650-51, 966 P.2d 367 (1998); *see also Pietz v. Indermuehle*, 89 Wn. App. 503, 511, 949 P.2d 449 (1998).

The discovery rule applies to allegations of breach of fiduciary duty. *Germain v. Pullman Baptist Church*, 96 Wn. App. 826, 832, 980 P.2d 809 (1999): (pastoral misconduct); *Hudson v. Condon*, 101 Wn. App. 866, 874, 6 P.3d 615 (2000): (partner's breach of fiduciary duty).

Under the discovery rule, a claim does not accrue until the claimant "discover[s] or reasonably should have discovered all of the essential elements of [the] possible cause of action [.]" *Ohler v. Tacoma Gen. Hosp.*, 92 Wn.2d 507, 511, 598 P.2d 1358 (1979); *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). Knowledge of the factual, not the legal, basis of the action is the key consideration under the discovery rule. *Id.* "The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action."

Mr. Sloan alleged Mr. Hamilton breached his fiduciary duty by repudiating Mr. Sloan's equitable interest in the duplex property, evidenced by evicting him without paying him the value of his equitable interest, having him sign a lease, and disposing of his chattel property after he was evicted December 7, 2010. Appendix, p. 19, ¶ 91.

Yet, Mr. Sloan made no allegation of actual damage caused by the breach, nor could he have done so at that time — as of December 10, 2013. That is, it was not until January 2015 that Mr. Hamilton's breach of

fiduciary duty proximately caused damage. Because Mr. Sloan had not paid the loan, obtained for his benefit by Hermans and then Hamiltons, Mr. Hamilton had no duty, either legal or equitable, to pay Mr. Sloan the value of his equitable interest in the property, convey the property to him, or pay him rental income generated by the property. *Smith v. Monson*, 157 Wn. App. 443, at 448, 236 P.3d 991 (2010): (equitable mortgage created duty to convey real property back to the borrower *once she paid off the underlying home loan*).

However, once Hamiltons sold the duplex and retained all monies from it for themselves, Mr. Hamilton's breach of fiduciary duty became the proximate cause of damage. Thus, it was not until 2015 the necessary element of damage was proximately caused by Mr. Hamilton's breach of fiduciary duty. Accordingly, Mr. Sloan's cause of action for breach of fiduciary duty did not accrue until 2015.

Alternatively, Mr. Sloan could have believed, based on his long friendship with and trust in Mr. Hamilton, that Hamiltons' demand for rent and eviction actions reflected nothing more than a demand for contribution to expenses related to the duplex property, not at all indicating an intent to deprive of all his interest in the property. CP 427, lines 20-23; CP 429, lines 4-7; CP 429, ¶¶ 25-26; CP 430, ¶ 29. The parties dispute whether Hamiltons' demand for rent and eviction processes

occurring before December 7, 2010 did, or should have, put Mr. Sloan on notice of a cause of action for breach of fiduciary duty. But it is undisputed that Mr. Sloan knew for certain of Hamiltons' intent to evict him on December 7, 2010, when the sheriff evicted him from the premises.

From these facts, jurors could reasonably conclude that, due to his long friendship with Mr. Hamilton, he neither knew nor should have known that Mr. Hamilton had breached his fiduciary duty. And, what a person knew or should have known is a question of fact reserved for the trier of fact to decide. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 34-35, 864 P.2d 921 (1993).

**(9) Limitation of Actions: Idaho Sale Proceeds**

Mr. Sloan contends that Mr. Hamilton has a fiduciary duty to account for the proceeds from the sale of Mr. Sloan's Idaho vacation property (hereafter sale proceeds). The statute of limitations for breach of fiduciary duty is three years. *Mayer v. Huesner*, 126 Wn. App. 114, 107 P.3d 152 (2005); RCW 4.16.180(2).

Hamiltons came into possession of Mr. Sloan's sale proceeds with his permission and approval, while Mr. Hamilton was acting as Mr. Sloan's attorney-in-fact. During oral argument, Hamiltons' attorney

acknowledged his clients received the sale proceeds check in 2006. RP 25-26.

Mr. Sloan first requested an accounting regarding the sale proceeds in his Second Supplemental Declaration of April 18, 2011 (CP 422-423, ¶¶ 9-11), two years and eight months before his complaint was filed on December 9, 2013. The latter complaint alleged the right to, and made demand for, an accounting of the sale proceeds. CP 6-7, ¶¶ 3.22 to 3.25, and Prayer for Relief, CP 17, ¶ 8.3. These matters were reiterated in Mr. Sloan's Amended Complaint filed October 17, 2014. Appendix p. 7, (¶¶ 29-31 and Prayer for Relief ¶ 8, at p. 28.

Hamiltons did not respond to Mr. Sloan's April 18, 2011 request for an accounting regarding the sale proceeds. No facts existed *prior* to April 18, 2011, that would have put Mr. Sloan on notice that Hamiltons would misuse or retain for themselves part or all of the sale proceeds, or that they intended to deprive him permanently thereof.

In short, it was Hamiltons' failure to respond to his April 2011 request for an accounting that put Mr. Sloan on notice that he would have to sue to obtain an accounting and, depending on the accounting outcome, restitution.

In oral argument during the summary judgment proceedings, Hamiltons' attorney advanced no suggestion as to why the statute of

limitations would have expired prior to December 9, 2013 regarding an accounting for sale proceeds. Rather, he merely queried as to *why* Mr. Herman had the check and why he had not given it to Hamiltons earlier. RP 25-26.

Hamiltons' duty to account for the sale proceeds arises not only from the fiduciary relationship that existed *when he received the funds*, but arises from long existing principles of equity jurisprudence in addition to and *independent of the fiduciary relationship*.

The foregoing point was made clear by our Supreme Court in *Bill v. Gattavara*, 34 Wn.2d 645, at 648, 209 P.2d 457 (1949):

A person should not be permitted unjustly to enrich himself at the expense of another. The obligation to do justice rests upon all persons and if one obtains the property of another, or the proceeds of the property of another, without a right to so obtain, equity can, in a proper case, compel restitution or compensation. It is not necessary in order to create an obligation to make restitution or to compensate, that the party unjustly enriched should have been guilty of any tortious or fraudulent act. The question is: Did he, to the detriment of someone else, obtain something of value to which he was not entitled?

In *Davenport v. Washington Educ. Ass'n*, 147 Wn. App. 704, at 725-726, 197 P.3d 686 (2008), Plaintiffs alleged that the Washington Education Association (WEA) had misused Plaintiffs' membership fees, and that such misuse constituted conversion and/or, based on equity

principles, constituted unjust enrichment entitling them to restitution. On appeal, the court determined that because WEA did not obtain the fees wrongfully, there was no cause of action for conversion, but retention and misuse of the fees did constitute unjust enrichment, entitling the Plaintiffs to restitution:

Sometimes termed a cause of action for ‘a contract implied in law “quasi contract,” or " money had and received," the common law action for restitution employs unjust enrichment as an independent basis of substantive liability. The *Restatement of Restitution and Unjust Enrichment (Third)* states:

A more important misconception is that restitution is essentially *a remedy*, available in certain circumstances to enforce obligations derived from torts, contracts, and other topics of substantive law. On the contrary, restitution (meaning the law of unjust or unjustified enrichment) is itself a source of obligations, analogous in this respect to tort or contract. A liability in restitution is enforced by restitution's own characteristic remedies, just as a liability in contract is enforced by what we think of as contract remedies.

Unlike the law of conversion, which requires that the transferee have *wrongfully* received the property of another, the law of restitution requires only that the transferee have received the property of another under circumstances that result in the transferee's "unjust enrichment."

[Footnotes omitted, emphasis the court's].

Thus, whether Mr. Hamilton was or was not acting as Mr. Sloan's attorney-in-fact when he received the sale proceeds is irrelevant to the issues of (1) the duty to account for and pay to Mr. Sloan the remainder of those funds, allowing credit for proper disbursements thereof, and (2) when a cause of action accrued regarding an action for accounting and restitution.

The statute of limitations for unjust enrichment is three years. RCW 4.16.080(3); *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 837-38, 991 P.2d 1126 (2000).

Mr. Sloan brought an action well within three years following his request for an accounting for the Idaho sale proceeds, which was April 18, 2011. CP 423, ¶ 11. Therefore, his cause of action for an accounting and restitution should not have been dismissed, because the lawsuit was filed December 9, 2013. The present lawsuit was filed December 9, 2013, approximately two years and eight months after Mr. Sloan first requested an accounting in his declaration filed April 18, 2011. CP 423, ¶ 11.

Mr. Sloan does not know what Hamiltons did with the Idaho sale proceeds. CP 422-423, ¶¶ 9-11. They have not provided a documented accounting.

Again, Defendants have suggested no reason that the statute of limitations regarding Mr. Sloan's Idaho sale proceeds would have begun

running prior to April 18, 2011. Hamiltons' demand for rent, or initiation of eviction proceedings, could not put Mr. Sloan on notice that they would not account for the sale proceeds, or embezzle or otherwise misuse those monies. Thus, the first notice that Mr. Sloan had regarding the Hamiltons' possible intent to permanently deprive him of *anything* came on December 7, 2010, when he was actually evicted from the duplex property.

Finally, whether Mr. Sloan knew or reasonably should have known facts supporting a cause of action for an accounting is a question of fact. Unless evidence is undisputed or unless reasonable minds cannot differ, what a person knew or should have known at a given time is a question of fact. *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 170, 855 P.2d 680 (1993).

Mr. Sloan's cause of action regarding the Idaho sale proceeds should not have been dismissed, because there are disputed material facts as to when he knew or should have known facts supporting a cause of action for either (1) fiduciary accounting, and/or (2) Hamiltons' potential unjust enrichment through misuse of the monies.

**(10) Limitation of Actions: Chattel — Conversion**

Conversion is the unjustified, willful interference with chattel

property which deprives a person entitled to the property of possession. *Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank*, 80 Wn. App. 655, 674-75, 910 P.2d 1308 (1991). To maintain a conversion action, the plaintiff need only establish "some property interest in the goods allegedly converted." See *Michel v. Melgren*, 70 Wn. App. 373, 376 853 P.2d 940 (1993) (citing *Sussman v. Mentzer*, 193 Wash. 517, 520, 76 P.2d 595 (1938)); *Pacific Gamble Robinson Co. v. Chef-Reddy Foods Corp.*, 42 Wn. App. 195, 202, 710 P.2d 804 (1985), review denied, 105 Wash.2d 1008 (1986)). Conversion claims are subject to a three-year statute of limitations. RCW 4.16.080(2). *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997).

It is undisputed that Mr. Sloan was evicted from the duplex property on December 7, 2010. It is also undisputed that Mr. Hamilton removed and disposed of Mr. Sloan's chattel until *after* December 7, 2010. On February 27, 2011, Mr. Sloan requested access to his personal belongings, stating that "...I need my KW [Kenworth truck] flatbed and personal belongings right away." CP 420.

Further, it cannot be disputed that the writ of restitution by which Mr. Sloan was evicted, was entered November 30, 2010 was unlawful. More specifically, Mr. Sloan was never served with notice of the November 30, 2010 eviction proceedings.

A default judgment entered without valid service is void and may be vacated when the want of jurisdiction is established, regardless of the passage of time. *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 370-71, 83 P.2d 221 (1938). A default judgment entered without proper jurisdiction is void. *In re Marriage of Markowski*, 50 Wn. App. 633, 749 P.2d 754 (1988), at 635-36, 749 P.2d 754; see also *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 480, 486, 674 P.2d 1271 (1984).

It is an undisputed matter of fact that Hamiltons acquired dominion and control over Mr. Sloan's personal belongings, as listed in his original complaint and amended complaint *after* December 7, 2010. CP 17-18; Appendix p. 29. Therefore, as a matter of law, Mr. Sloan's cause of action for conversion did not accrue until *after* December 7, 2010. Accordingly, Mr. Sloan's cause of action for conversion should not have been dismissed.

**E. CONCLUSION**

Mr. Sloan's causes of action based on the statute of limitations constituted legal error and, therefore, the trial court's ruling must be reversed and the case remanded for trial.

DATED this 24<sup>th</sup> day of July, 2017.

Respectfully submitted,

  
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JOHN A. BARDELLI, WSBA No. 5498  
Attorney for Appellant

**DECLARATION OF SERVICE**

John A. Bardelli declares as follows, under penalty of perjury of the State of Washington:

1. I am over the age of 18 years, competent to testify herein, and do so based upon personal knowledge of the matters stated.

2. On July ~~24~~<sup>24<sup>th</sup></sup>, 2017, I personally caused to be served a copy of the Appellant's Opening Brief by mailing a copy to opposing counsel, postage prepaid, at the following address:

Gregory Lockwood  
421 W. Riverside, Ste. 960  
Spokane WA 99201

DATED this ~~24~~<sup>24<sup>th</sup></sup> day of July, 2017.

  
\_\_\_\_\_  
JOHN A. BARDELLI  
Attorney for Appellant